UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EIGHT MILE STYLE, LLC and
MARTIN AFFILIATED, LLC,

Plaintiffs

vs.

APPLE COMPUTER, INC. and
AFTERMATH RECORDS d/b/a
AFTERMATH ENTERTAINMENT,

Defendants.

Case No. 2:07-CV-13164
Honorable Anna Diggs Taylor
Magistrate Judge Donald A. Scheer

_____________________________________/

DEFENDANT AFTERMATH RECORDS AND APPLE INC.'S OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO AMEND COMPLAINT

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CONCISE STATEMENT OF ISSUES PRESENTED

Whether the Court should permit, on the eve of trial, a substantial amendment to the Complaint, adding three new liability theories against a party that up to now has not been subject to any claims of liability, where:

(1) Plaintiffs cannot demonstrate the required "good cause" for their delay in seeking to amend the complaint until the eve of trial;

(2) The only explanation for such delay is bad faith and dilatory tactics initiated to insulate Plaintiffs' contradictory litigation position in another case, only to assert it now to artificially drive up the settlement value of this one; and

(3) The proposed amendment would substantially prejudice Aftermath in its ability to defend against three wholly new claims?

Defendants' answer: No.

CONTROLLING AUTHORITIES

Federal Cases

Bridgeport Music v. Rhyme Syndicate Music, 376 F.3d 615 (6th Cir. 2004)

Feist Publications v. Rural Telephone Service Co., 499 U.S. 340 (1991)

Gershwin Publ'g Corp. v. Columbia Artist Management, 443 F.2d 1159 (2d Cir. 1971)

Harry Fox v. Riverdeep, Inc., 2009 WL 1506670 (E.D. Mich. May 26, 2009)

Inge v. Rock Financial Corp., 281 F.3d 613 (6th Cir. 2002)

Johnson v. Mammoth Recreations, Inc., 975 F.2d 604 (9th Cir. 1992)

Leary v. Daeschner, 349 F.3d 888 (6th Cir. 2003)

Parker v. Columbia Pictures Indus., 204 F.3d 326 (2d Cir. 2000)

Shapiro, Bernstein & Co., Inc. v. H.L. Green Co., 316 F.2d 304 (2d Cir. 1963)

Sosa v. Airprint Sys., Inc., 133 F.3d 1417 (11th Cir. 1998)

Wade v. Knoxville Utilities Board, 259 F.3d 452 (6th Cir. 2001)

Federal Statutes

17 U.S.C. § 106

Federal Rules

Fed. R. Civ. P. 15

Fed. R. Civ. P. 15(a)

Fed. R. Civ. P. 16(b)

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

In their Motion for Leave to Amend their Complaint ("Motion") brought on the eve of trial (and which will be heard the day before trial is scheduled to commence), Plaintiffs seek to add *three* wholly new liability theories against a party that has never before been the target of *any* of Plaintiffs' claims. This Motion should be denied because the Plaintiffs cannot show the required "good cause" for their delay in seeking this relief. Indeed, the only excuse they offer is demonstrably false. The only conceivable basis for their delay in bringing this Motion is purely tactical, and their proposed amendment would substantially prejudice Defendants.

This Court should thus deny Plaintiffs' belated and unwarranted Motion for three reasons:

1. Plaintiffs cannot demonstrate "good cause" for their delay, offering only a patently false excuse. Aftermath Records intervened in this case nearly two years ago to address Plaintiffs' claims of infringement against Apple Inc. Plaintiffs did not make any claims against Aftermath at that time. Indeed, they said nothing about asserting any claim against Aftermath until August 3, just over two weeks ago. During the two years Plaintiffs remained silent, this Court's deadlines in the Scheduling Order governing this case came and went for adding parties, for moving for leave to amend, and for taking discovery. Under controlling Sixth Circuit law (that Plaintiffs fail to cite), Plaintiffs must show "good cause" for their delay in bringing this Motion outside of the deadlines established by this Court's Order . They cannot make this showing because there is no legitimate reason for their failure to seek this relief well within the Court's deadlines, or any time in the nearly two years since Aftermath first intervened.

The only explanation Plaintiffs offer for their delay is demonstrably false. Plaintiffs claim to have been surprised by Aftermath's "novel objection" asserted "for the first time" in a supplemental discovery response served in May of 2009. Mot. at 4; Busch Decl., ¶¶ 7-8. In that response, Aftermath explained that there can be no claim of damages against Aftermath without some claim of liability. But this objection was not "novel" and Plaintiffs' claim of surprise is belied by the record. Aftermath has pointed out, in writing, that it is not a defendant subject to a damages claim repeatedly *since at least May of 2008 — over a year before* the supplemental discovery response Plaintiffs falsely point to as "the first time" that Aftermath made this point. Since the beginning of motion practice, Aftermath has urged that it is *not* subject to a claim for copyright infringement in this action and thus Plaintiffs can assert no damages claim against it. The record speaks for itself, and strikingly refutes Plaintiffs' attempt to distract this Court from their own inexcusable delay in moving to amend.

2. Plaintiffs delayed only to protect their litigation position in another case, and assert this claim now in a transparent attempt to evade their obligation to pay a $2.5 million judgment in that case. One thing has changed that explains why Plaintiffs only now seek leave to amend. Until a short while ago, as this Court is aware, Plaintiffs were pursuing a claim against Aftermath in another federal court that was entirely inconsistent with a claim of infringement in this case. In the other case, *F.B.T. v. Aftermath ("F.B.T.")*, Plaintiffs conceded what they dispute here — that Aftermath had the authority to distribute records embodying the compositions in this case in permanent download form. In *F.B.T.*, Plaintiffs claimed to be entitled to much higher royalties from the very use that they claim here is unauthorized. But in March of 2009, a unanimous jury rejected Plaintiffs' claim in the *F.B.T.* case. Shortly after that, the *F.B.T.* court ordered Plaintiffs to pay Aftermath $2.5 million in attorney's fees and costs. After the post-trial briefing concluded, Plaintiffs no longer had anything to lose by proceeding against Aftermath on an infringement theory in this Court. They can assert this amendment now without fear of interference with their position in the *F.B.T.* case. They also only seek Aftermath's profits now in a misguided attempt to offset the judgment they face in the *F.B.T.* case — a judgment they have thus far refused to pay. This is pure gamesmanship, and this Court should not permit it.

3. Granting leave to amend would reward Plaintiffs' dilatory tactics and substantially prejudice Defendants. This Motion is set to be heard literally on the eve of trial (i.e., the day before trial commences). Not only do Plaintiffs seek to extend their claim of direct infringement from Apple only to Aftermath, Plaintiffs assert wholly new theories of "contributory" and "vicarious" infringement against Aftermath that have never before been at issue in this case. If the amendment is allowed, Aftermath will have to proceed to trial without any opportunity in discovery to develop the defenses unique to those secondary liability counts, and thus its ability to defend itself will be severely prejudiced. Further, Plaintiffs' new claim of direct infringement against Aftermath dramatically changes this litigation. Now, instead of just seeking Apple's profits, Plaintiffs are seeking profits from Aftermath as well. To allow this amendment on the eve of trial would substantially prejudice Defendants' trial presentation, while simultaneously rewarding Plaintiffs for their pure gamesmanship in delaying the filing of their Motion until the *F.B.T.* case was resolved. Plaintiffs' Motion must be denied.

II. PROCEDURAL AND FACTUAL BACKGROUND

A. *May-July 2007:* Plaintiffs and Their Related LLCs File Two Lawsuits Dealing with Digital Distribution of Eminem Records.

This lawsuit is part of a multi-district war Plaintiffs are waging relating to the digital distribution of Eminem records. Even before bringing this lawsuit, Plaintiffs initiated Phase One of that effort — *F.B.T. v. Aftermath* — through their related LLCs. *F.B.T.* was a breach of contract action against Aftermath in California, alleging that Aftermath was required to pay a royalty for the distribution of Eminem records in the form of permanent downloads through online music sources, like Apple's iTunes Store, that was nearly twice as high as the royalty rate the contract provided for distribution through "normal retail channels." A month later, Plaintiffs initiated Phase Two, suing Apple *only* in this lawsuit, claiming that Apple's distribution of the compositions embodied in the records constituted copyright infringement.

In March, the first part of this campaign ended in defeat for Plaintiffs when a unanimous jury rejected their baseless royalty theory against Aftermath. The *F.B.T.* court entered judgment in July against Plaintiffs' related LLCs and for Aftermath for approximately $2.5 million in attorney's fees and costs. Now, suddenly, on the eve of trial in this case, Plaintiffs seek to expand their lawsuit to include wholly new theories against Aftermath. The procedural history reveals that Plaintiffs' purported reason for the considerable delay in asserting those claims is entirely false. The real reason for delay thus far was most likely to preserve Plaintiffs' litigation position in the *F.B.T.* case.

B. ***September 2007-August 2008*: Aftermath Intervenes in this Case and Argues That There Are No Claims Against It --- Plaintiffs Say Nothing as This Court's Deadlines Pass.**

As Plaintiffs concede, Aftermath intervened in this case almost two years ago, in September of 2007. Plaintiffs agreed to the intervention but asserted no claims against Aftermath. *See* Doc. 8. In fact, Plaintiffs heavily *relied* on the fact that they asserted no claims against Aftermath to contest transfer to California. Doc. 13 at 3 ("Plaintiffs in [this case] have asserted no claims against Aftermath. Aftermath has filed no answer or other pleading in [this case]; there was nothing for Aftermath to 'answer' because no allegations have been directed to it."). In their Initial Disclosures, served six months after Aftermath's intervention, Plaintiffs confirmed that they sought only the profits "of Apple," and said nothing at all about the profits of Aftermath. *See* Ex. 1.

In January of 2008, this Court set an Initial Scheduling Order establishing deadlines for adding parties, for taking discovery, and for filing all motions. *See* Doc. 20. The deadline for adding parties was February 8, 2008 and the deadline for all motions was July 16, 2008. *See id*. In April, the parties asked the Court to coordinate the discovery schedule with the *F.B.T.* case, and the Court agreed, setting a deadline of June 2, 2008 for discovery and a deadline of August 4, 2008 for dispositive motions. *See* Docket Entry at April 29, 2008.

Beginning at least in May of 2008, before any of the Court's pertinent deadlines had passed, Aftermath pointed out the precise fact Plaintiffs purport to have been surprised by three months ago in May *of 2009*. For example:

May 16, 2008: In opposing Plaintiffs' motion to compel discovery well over a year ago, including discovery relating to damages, Aftermath explicitly pointed out throughout the brief

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that Plaintiffs were not entitled to such discovery because there was no claim of infringement against Aftermath. *See* Doc. No. 40 at i ("Plaintiffs seek discovery on Aftermath's profits and losses, yet the Complaint does not allege copyright infringement by Aftermath. . ."); *id*. at 1 Plaintiffs "seek discovery on Aftermath's profits and losses for purposes of calculating Plaintiffs' alleged damages, yet the Complaint does not allege copyright infringement by Aftermath."; *id* at 18 (stating that the burden of Aftermath preparing damages information "is completely unjustified, especially given that Aftermath's profits and losses are irrelevant; Apple, not Aftermath, is the alleged infringer according to Plaintiffs' Complaint, and Apple's net profits should be used to measure alleged damages.")

May 30, 2008: Later that month, Aftermath again made the same point in its Reply to the Motion to Bifurcate Liability and Damages. *See* Doc. No. 45 at 1, 4 (explaining that "the Complaint does not contain a single allegation that Aftermath engaged in copyright infringement," and that Aftermath should not be required to produce damages documents because "the Complaint alleges that *Apple* infringed Plaintiffs' copyrights and seeks *Apple's* net profits.")

August 12, 2008: Defendants *again* made the same point in their Expert Disclosure: "Plaintiffs' Complaint contains no allegations of copyright infringement against intervening defendant Aftermath. Accordingly, Defendants believe that, regardless of the Court's ruling on the Defendants' motion for summary judgment, evidence regarding Aftermath's revenues and expenses is not relevant."

This Court's deadline for motions passed on July 16, 2008, and for dispositive motions on August 4, 2008. Plaintiffs did not seek leave to amend before those dates, even though they had all the information then that they now claim prompts them to seek leave to amend.

C. *August 2008 through August 3, 2009*: Plaintiffs Say Nothing About Leave to Amend Until After They Lose the *F.B.T. v. Aftermath* Case

In December of 2008, this Court denied Defendants' Motion for Summary Judgment and several other motions, but reopened the discovery period to allow for discovery limited to discrete issues, including damages. During this flurry of motion practice, Plaintiffs said nothing about amending their Complaint to add a claim against Aftermath, even though they knew they had only asserted a claim against Apple, and were on explicit notice from Aftermath of the significance of failing to assert such a claim against Aftermath.

In March of 2009, Plaintiffs lost Phase One of their digital music offensive when the *F.B.T.* trial concluded. Aftermath moved for attorney's fees and costs, and the *F.B.T.* court ordered Plaintiffs to pay Aftermath approximately $2.5 million. The final amended judgment was entered on July 8, and Plaintiffs have appealed.

During the *F.B.T.* trial, Plaintiffs requested that Defendants supplement their discovery responses in this case in light of the Court's Order allowing for limited discovery. Defendants did so, and again asserted that there is no claim for liability and thus no claim of damages against Aftermath. Now, three months after Aftermath served that supplemental discovery response, Plaintiffs for the first time seek leave to amend their complaint to include claims of direct, contributory and vicarious infringement against Aftermath. Plaintiffs Motion to Amend was filed more than a year after the motions deadline in this Court's Scheduling Order, and more than a year after Plaintiffs first received notice of the defense they now claim to have been "surprised" by when it was reasserted in May of 2009.

III. ARGUMENT

A. Plaintiffs Cannot Demonstrate the Requisite "Good Cause" for their Protracted Delay in Seeking Leave to Amend

1. As an Initial Matter, the "Good Cause" Standard of Rule 16(b) Governs Plaintiffs' Motion

Plaintiffs misstate the legal standard for their Motion, focusing only on the standard set forth in Federal Rule of Civil Procedure 15(a) governing leave to amend. But, here, Plaintiffs seek leave to amend more than a year after all deadlines set by this Court's Scheduling Order for seeking such relief had passed. *See* Doc. 20 (setting deadline to add parties in February 2008 and deadline for "all motions" of July 16, 2008). Before this Court considers whether amendment is proper under Rule 15, Plaintiffs must first show that they have "good cause" for failing to seek leave to amend within the time provided by the Scheduling Order. *Leary v. Daeschner*, 349 F.3d 888, 909 (6th Cir. 2003) ("Once the scheduling order's deadline passes, a plaintiff first must show good cause under Rule 16(b) for failure earlier to seek leave to amend before a court will consider whether amendment is proper under Rule 15(a)."); *see also Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 340 (2d Cir. 2000) (affirming a district court's requirement of "good cause" for seeking leave to amend outside the time provided in the Scheduling Order "despite the lenient standard of Rule 15(a)"); *Sosa v. Airprint Sys., Inc.*, 133 F.3d 1417, 1419 (11th Cir.1998) ("[B]ecause [plaintiff's] motion to amend was filed after the scheduling order's deadline, [plaintiff] must first demonstrate good cause under Rule 16(b) before we will consider whether amendment is proper under Rule 15(a)."); *Johnson v. Mammoth*

Recreations, Inc., 975 F.2d 604, 610 (9th Cir.1992) (holding that parties cannot use Rule 15 to "short-circuit[]" Rule 16's standards because that would allow parties to disregard the scheduling order and "would undermine the court's ability to control its docket, disrupt the agreed-upon course of the litigation, and reward the indolent and the cavalier").

The "primary measure" of good cause is "the moving party's diligence in attempting to meet the case management order's requirements." *Inge v. Rock Financial Corp*., 281 F.3d 613, 625 (6th Cir. 2002); *see also Leary,* 349 F.3d at 907. Plaintiffs cannot show that they were diligent in attempting to raise this issue in a timely manner. To the contrary, they had all the information they needed to make this request *at least* as early as May 2008, well within the deadline for filing motions. The sole reason they offer for their failure to do so is explicitly contradicted by the record.

2. Plaintiffs' Sole Explanation for Their Protracted Delay in Seeking Leave to Amend Falsely Characterizes the Record and Cannot Constitute "Good Cause"

Plaintiffs claim that they have not moved for leave to amend until now, because they had no idea until three months ago that Aftermath contended there was no infringement claim and thus no damages claim against it. Plaintiffs claim that in May 2009, Aftermath asserted a "novel objection" that prompted Plaintiffs to seek leave to amend the complaint. Plaintiffs contend that was "the first time Defendants ever implied" that Plaintiffs have no claim of damages against Aftermath. Mot. at 7; Busch Decl., ¶ 7. Aftermath's purported delay in raising this argument is the sole reason Plaintiffs give to explain their own protracted, otherwise inexcusable delay in seeking to amend their complaint. This contention, on which Plaintiffs' entire Motion depends, is entirely false.

In the year preceding the discovery response Plaintiffs rely on to justify their delay, Aftermath made the precise argument Plaintiffs claim to have been "surprised" by in repeated Court filings. To name just a few examples:

- ***Defendants' Opposition to Plaintiffs' Motion to Compel, filed May 16, 2008:*** Defendants argued prominently throughout this Opposition that Plaintiffs' requests for damages discovery should be denied because Plaintiffs "seek discovery on Aftermath's profits and losses for purposes of calculating Plaintiffs' alleged damages, yet the Complaint does not allege copyright infringement by Aftermath." *See* Doc. 40 at i. *See also id* at 18 (stating that the burden on Aftermath to prepare damages information "is completely unjustified, especially given that Aftermath's profits and losses are irrelevant; Apple, not Aftermath, is the alleged infringer according to Plaintiffs' Complaint, and Apple's net profits should be used to measure alleged damages.")
- ***Defendants' Reply in Support of their Motion to Bifurcate, filed May 30, 2008***: Defendants argue in the first pages that "the Complaint does not contain a single allegation that Aftermath engaged in copyright infringement," and that Aftermath should not be required to produce damages documents because "the Complaint alleges that *Apple* infringed Plaintiffs' copyrights and seeks *Apple's* net profits." *See* Doc. 45 at 1, 4.
- ***Defendants' Expert Disclosure, served August 12, 2008***: Defendants specifically stated: "Plaintiffs' Complaint contains no allegations of copyright infringement against intervening defendant Aftermath. Accordingly, Defendants believe that,

> regardless of the Court's ruling on the Defendants' motion for summary judgment, evidence regarding Aftermath's revenues and expenses is not relevant." *See* Ex. 2 at 2 fn. 1.

In light of this record, Plaintiffs must have known that Aftermath was not litigating this case "as though infringement claims were asserted against both Apple and Aftermath," as they claim in their Motion. Mot. at 2. Aftermath has repeatedly advised Plaintiffs that was not the case. Nevertheless, Plaintiffs failed to seek leave to amend until well over a year after Aftermath specifically brought this issue to their attention.

Of course, Plaintiffs did not need to rely on Aftermath to explain what was at issue in Plaintiffs' own lawsuit. Plaintiffs *knew* there was no claim of liability or damages against Aftermath and said so in many of their own filings. For example, in their Initial Disclosures, Plaintiffs stated that they were seeking *"the profits of Apple* that are attributable to the digital reproduction, sale, and distribution of the Eminem Compositions[.]" *See* Ex. 1 at 4 (emphasis added). Plaintiffs said nothing about seeking *Aftermath's* profits, even though Aftermath had intervened nearly six months before the Initial Disclosures were served. Even Plaintiffs thus acknowledged that there was no claim for damages against Aftermath, and have never supplemented these Initial Disclosures to provide that there is.

Plaintiffs can give no legitimate reason for their failure to seek leave to amend when Aftermath intervened in September of 2007, for their failure to list Aftermath's profits as part of the damages they were seeking in their Initial Disclosures served in February of 2008, or for their failure to move for leave to amend any time after Aftermath explicitly brought the issue to Plaintiffs' attention in multiple court filings beginning in May of 2008. At any of these points, the Court's Scheduling Order would not have had to be altered for this Court to hear the Motion Plaintiffs now belatedly bring. Plaintiffs therefore cannot show the required "good cause" to explain their failure to move for leave to amend within the time provided by this Court's Scheduling Order. Following settled Sixth Circuit precedent, this Court should deny the Motion on that ground alone.

B. Leave to Amend Under Rule 15 Is Improper In Any Event

If Plaintiffs were able to demonstrate "good cause" for their delay — which they cannot — only then would the Court need to determine whether leave to amend is appropriate under Rule 15(a). As the Sixth Circuit has explained, that analysis requires consideration of multiple factors. *See Wade v. Knoxville Utilities Bd.*, 259 F.3d 452, 458 (6th Cir. 2001). Among those factors, "[u]ndue delay in filing" is a significant reason to deny leave to amend. *Id*. In fact, "[w]hen amendment is sought at a late stage in the litigation, there is an increased burden to show justification for failing to move earlier." *Id*. at 459. Plaintiffs cannot meet this "increased burden" because they have no legitimate reason for failing to move for leave to amend months earlier. Plaintiffs' "undue delay" thus provides ample reason to deny the Motion even in the absence of other factors.

But delay is not the only reason this Court should deny the Motion. Other factors weigh against amendment as well Plaintiffs bring this Motion in bad faith, because the only rational explanation for their lack of diligence is that they intentionally delayed in seeking leave to amend to protect their litigation position in another case. *Id*. at 458 (stating that the movant's "bad faith" is a factor to consider). Moreover, Defendants would suffer substantial prejudice if this belated amendment were permitted. *Id.* at 458-459 (stating that prejudice to non-moving party is factor in determining whether leave to amend should be granted).

1. Plaintiffs' Bad Faith Claim of Surprise Is Meant to Conceal the Real Purpose Behind Their Dilatory Tactics

As explained, Plaintiffs' purported claim of "surprise" as the reason for this extremely late motion to amend is entirely false. Plaintiffs simply could not have been surprised three months ago by a claim that Defendants had been making for well over a year. More likely, Plaintiffs had their own reasons to delay in asserting a claim of infringement against Aftermath. In fact, until recently, claiming infringement against Aftermath would have been inconsistent with Plaintiffs' related LLCs' position in the *F.B.T.* litigation. Plaintiffs have only sought to proceed directly against Aftermath since the *F.B.T.* case was resolved adversely to Plaintiffs. In light of Plaintiffs' protracted and otherwise inexplicable delay in seeking to amend, it is likely that Plaintiffs simply delayed making this claim until doing so would not interfere with their claim in their other lawsuit.

In *F.B.T.*, the Plaintiffs, through their related LLCs, sought to obtain a considerably higher royalty rate for sales of Eminem records in permanent download form through retailers like the iTunes Store. In that case, Plaintiffs pointedly did not dispute that the distribution was authorized. Instead of alleging copyright violations, Plaintiffs contended that Aftermath did not pay the right royalty under the recording agreements. If Plaintiffs had simultaneously sought relief for copyright infringement against Aftermath in this Court, they would have been alleging two inconsistent theories in two different federal courts. Plaintiffs would have been claiming in this Court that Aftermath lacked authorization for the very distribution they were claiming to have been underpaid for in another federal court. Absent any other explanation for their delay, Plaintiffs very likely concluded it would be too risky to maintain those conflicting positions simultaneously, and so elected to forego direct claims against Aftermath in this Court while the *F.B.T.* case was pending.

A few months ago, the *F.B.T.* case ended with a unanimous jury verdict rejecting Plaintiffs' royalty theory. It thus no longer poses the same risk to claim infringement against Aftermath. Only after the *F.B.T.* case resolved — and Plaintiffs were subject to the losing end of a $2.5 million attorney's fees and costs award — did Plaintiffs seek to proceed directly against Aftermath on their multiple new theories of infringement.

It simply cannot be a coincidence that Plaintiffs only now seek to amend their Complaint. It is much more likely that Plaintiffs delayed in asserting this claim as long as doing so posed a risk to the *F.B.T.* case. Now that that case has been resolved, they feel free to assert their contradictory claim without fear of reprisals. Moreover, their recent shift to target the profits of Aftermath (and not just Apple) is most likely aimed at gaining some perceived settlement advantage in order to try to offset the sizable judgment Plaintiffs owe to Aftermath.

If Plaintiffs purposefully delayed in seeking leave to amend to protect their litigation position in another case — and, on this record, that is the only explanation that makes sense — that is more than ample reason to deny the Motion. Parties are not permitted to employ stalling tactics to preserve their litigation positions in a parallel case. Plaintiffs had a duty to move diligently in bringing any issues to this Court's attention. They must now accept the consequences of failing to do so.

2. Allowing Plaintiffs' Proposed Amendment on the Eve of Trial Would Substantially Prejudice Defendants

Finally, this Court must consider the severe prejudice Defendants would suffer if this belated amendment were permitted the day before trial is set to begin. This case has always involved only a single claim of direct infringement against Apple. The parties have conducted extensive discovery on *that* claim, not any other. While Aftermath's licenses from Plaintiffs are Apple's defense to that infringement claim, Aftermath itself has never been accused of infringement until now.

Plaintiffs' amendment includes a new claim of direct infringement against Aftermath, plus two wholly new allegations that have never before been a part of this case. Plaintiffs accuse Aftermath of wholly new claims of *contributory* and *vicarious* infringement. Each of these claims requires proof of elements that have *never before been at issue* in this case. *Bridgeport Music v. Rhyme Syndicate Music*, 376 F.3d 615, 622 (6th Cir. 2004). Amending the Complaint on the eve of trial to allow for these new liability theories would substantially prejudice Aftermath and hamper its ability to defend itself at trial.

To present a prima facie case of direct infringement, Plaintiffs must show (1) ownership of valid copyright; and (2) copying of the copyrighted work (or some other violation of one of the exclusive rights granted to the copyright owner in 17 U.S.C. § 106). *See Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340, 361 (1991). Plaintiffs' new contributory and vicarious infringement claims require proof not only of the two elements of direct infringement, but of additional elements as well.

To prove contributory infringement, Plaintiffs must prove the first two elements of direct infringement, plus at least two more. Plaintiffs must prove not only (1) ownership of a valid copyright; (2) copying or some other violation of the copyright holder's exclusive rights; but also (3) that Aftermath had *knowledge* of the infringement; and (4) induced, caused or materially contributed to the infringement. *See Harry Fox v. Riverdeep, Inc.*, 2009 WL 1506670, at *3 (E.D. Mich. May 26, 2009); *Gershwin Publ'g Corp. v. Columbia Artist Management*, 443 F.2d 1159, 1162 (2d Cir. 1971). Neither the element of requisite *knowledge* of the infringement, nor the element of *inducing, causing or materially contributing* to another's infringement have been at issue throughout discovery in this action. To respond to each of these alleged elements, Defendants would need to develop significant additional evidence. For example, Aftermath would need to respond to the new claim that it had "knowledge" of the purported infringement with evidence of its own witnesses' good faith belief that the distribution of records containing the Eminem Compositions was entirely authorized. While Defendants have brought forth evidence of license or authorization, Defendants have not explored or presented evidence of its own witnesses' *good faith belief* in the authorization allowing the distribution of recordings of Eminem Compositions through iTunes. Aftermath's good faith has never before been an issue. Forcing Aftermath to scramble to identify and prepare witnesses who could testify to that good faith belief at this juncture without delaying trial would create significant hardship that could not be redressed.

Plaintiffs' other new claim is for vicarious infringement against Aftermath. That claim requires proof of additional elements as well. Plaintiffs must show not only (1) ownership of a valid copyright; (2) some violation of the exclusive rights under Section 106; but also (3) *the right and ability to supervise* the infringing copyright activities, and (4) a direct financial interest in such activities. *See Shapiro, Bernstein & Co. Inc. v. H.L. Green Co.*, 316 F.2d 304, 307 (2d

Cir. 1963). Plaintiffs' new allegations of Aftermath's "supervis[ion] and control" of Apple and its business operations has never before been at issue in this case. Proposed Amended Complaint at ¶¶ 17, 26. Defendants are entitled to the full panoply of discovery before trial to understand what it is Plaintiffs are claiming here, and whether the claim has any merit. What supervision or control did Aftermath ever exercise over Apple's distribution of these sound recordings? What "right" do Plaintiffs' claim Aftermath had to control the allegedly infringing conduct? What "ability to supervise" existed between Aftermath and Apple? Expert testimony could be required to respond to this assertion. But under Plaintiffs' amendment, Defendants would be railroaded into trial blind as to what Plaintiffs intend to present to prove this element, and would be forced to scramble to develop evidence on the fly, without discovery, regarding the scope of this purported "supervis[ion] and control" that Plaintiffs contend Aftermath enjoyed.

Moreover, it would substantially prejudice Aftermath if forced to trial on a day's notice, without more of an understanding of *all of these* secondary liability claims than the bare allegations included in Plaintiffs' proposed first amended complaint. Plaintiffs' proposed amendment merely parrots the additional elements of "knowledge," "material[] contributi[ion]" and "the right and ability to supervise and control," without any explanation of what facts they intend to prove at trial to support those elements. Proposed Amended Complaint at ¶¶ 16, 17, 25, 26. If the amendment were allowed, the first opportunity Defendants would have to examine Plaintiffs' witnesses on these new claims would be *at trial*. That would impose substantial prejudice on Defendants in their pretrial preparation and their trial presentation.

Plaintiffs presumptuously claim there can be no prejudice because the parties have all along assumed Aftermath was a target of Plaintiffs' infringement claims. This misstates both

Plaintiffs' position and Aftermath's understanding, as the court filings described in Section A.2. above make clear. Plaintiffs ignore all of those specific and explicit assertions that both they and Aftermath made limiting the claims in this case only to those against Apple. Instead, Plaintiffs point to single lines of briefs in which Defendants jointly addressed both Apple's distribution and Aftermath's license from Plaintiffs for that distribution in the recording agreements. Mot. at 2. Plaintiffs call those snippets from briefs "admissions" that both Aftermath and Apple were subject to liability claims. In light of the specific reservations Aftermath asserted, those casual snippets used in introductory paragraphs cannot convert Apple's defense into a whole new claim for liability.

Plaintiffs also attempt to use Aftermath's responses to Plaintiffs' discovery requests relating to damages as some sort of admission. Plaintiffs argue that, because Aftermath has already produced all the financial information that could potentially be relevant if Aftermath were subject to a claim of infringement, there can be no prejudice. That would be a perverse result indeed. Aftermath produced profit and loss statements for 44 compositions in an attempt to avoid a dispute, not as a concession that Plaintiffs had asserted a damages claim against it. This Court should not punish Aftermath by requiring it to submit to Plaintiffs' wholly new claims because it produced material sought in discovery to avoid troubling this Court with a dispute.

In sum, this Court should reject Plaintiffs wholesale inclusion of new theories so soon before trial is set to begin, because to allow this amendment would substantially and irremediably prejudice Aftermath.

IV. CONCLUSION

For all these reasons, this Court should deny Plaintiffs' motion for leave to amend.

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CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2009, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to the all counsel.

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